

ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 07-1347

WILLIAM DAVID HICKS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 24, 2008

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. CR2007-1258]

HONORABLE BARRY ALAN SIMS,
JUDGE

AFFIRMED

SARAH J. HEFFLEY, Judge

Appellant was convicted of sexual assault in the second degree and now appeals his conviction, asserting that the State failed to prove his act was for the purpose of sexual gratification. We find that appellant's argument is not preserved for our review and affirm.

Appellant was accused of sexually assaulting the six-year-old daughter of a friend and neighbor, specifically by placing her hand on his penis. The jury heard testimony from the victim's mother, police officers, and the victim herself. The victim testified that appellant was spending the night at her house and, while watching television with him, he turned on a "nasty channel," and the people on the television "just like had a bra on and panties" and "they were showing like half of their, half of their boob and I closed my eyes when I saw it." The victim testified that appellant then took her hand and placed it on his "private part," which was under a blanket. The victim also described another instance in which appellant exposed his penis to her while he was changing clothes.

At the close of the State’ s case, appellant made a motion for directed verdict, arguing that the State had failed to prove the victim’ s age and that the State failed to prove “ sexual contact.” Appellant’ s motion was denied, as was his renewed motion at the close of all the evidence. The jury found appellant guilty and recommended a sentence of fifteen years’ imprisonment, which the court adopted and imposed. This appeal followed.

Appellant was convicted under Ark. Code Ann. § 5-14-125(a)(3) (Repl. 2006), which states that a person commits sexual assault in the second degree if that person is eighteen years of age or older and engages in “ sexual contact” with a person who is less than fourteen years of age and not the person’ s spouse. “ Sexual contact” is defined as “ any act of sexual gratification involving the touching . . . of the sex organs, buttocks, or anus of a person or the breast of a female.” Ark. Code Ann. § 5-14-101(9) (Repl. 2006).

On appeal, appellant concedes that he did place the victim’ s hand on his penis but argues that the State failed to produce substantial evidence that he did so for the purpose of sexual gratification. However, this precise argument is not preserved for appeal. Rule 33.1(c) of the Arkansas Rules of Criminal Procedure provides:

(c) The failure of a defendant to challenge the sufficiency of the evidence at the times and in the manner required in subsections (a) and (b) above will constitute waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment. A motion for directed verdict or for dismissal based on insufficiency of the evidence must specify the respect in which the evidence is deficient. A motion merely stating that the evidence is insufficient does not preserve for appeal issues relating to a specific deficiency such as insufficient proof on the elements of the offense

Our supreme court has ruled that Rule 33.1 must be strictly construed. *Eastin v. State*, 370 Ark. 10, 257 S.W.3d 58 (2007). Thus, to preserve an issue for appeal from a decision on a directed-verdict motion, the issue must be stated clearly and specifically to the circuit court.

Phillips v. State, 361 Ark. 1, 203 S.W.3d 630 (2005), apprising the circuit court of the “ particular point raised.” *Tester v. State*, 342 Ark. 549, 553, 30 S.W.3d 99, 102 (2000). The reasoning underlying this holding is that when specific grounds are stated and the absent proof is pinpointed, the circuit court can either grant the motion, or, if justice requires, allow the State to reopen its case and supply the missing proof. *Id.* A further reason that the motion must be specific is that this court may not decide an issue for the first time on appeal. *Id.*

In his directed-verdict motion, appellant argued, generally, that the State had failed to prove sexual contact. As noted above, the term “ sexual contact” has a well-defined meaning that includes several elements. It involves the “ touching” of “ sex organs” “ for the purpose of sexual gratification.” Ark. Code Ann. § 5-14-101(9). In the motion, appellant’ s attorney failed to identify a specific element of sexual contact that was not established by the State. The motion did not assert a specific flaw in the State’ s case. Because appellant’ s motion for a directed verdict was general and did not inform the trial court of the specific issues in the State’ s case that were being challenged, it did not comply with the requirements of Rule 33.1. *Pratt v. State*, 359 Ark. 16, 194 S.W.3d 183 (2004). Because appellant is presenting an argument on appeal that was not argued to the trial court, we find that appellant’ s argument is not preserved for our review and affirm.

Affirmed.

PITTMAN, C.J., agrees.

MARSHALL, J., concurs.

MARSHALL, J., concurring. I would reach the merits and affirm. The State’s evidence, which the court aptly summarizes, was substantial. The record thus supports the conviction. *Cook v. State*, 350 Ark. 398, 407, 86 S.W.3d 916, 922 (2002).

In my view, Hicks's directed-verdict motion was adequate to preserve his sufficiency argument for appeal. Second-degree sexual assault contains four elements. If Hicks had argued below that the evidence on the charge was insufficient without giving any particulars, then his argument on appeal would not be preserved. *Eastin v. State*, 370 Ark. 10, 14–15, 257 S.W.3d 58, 62–63 (2007). As our court notes, however, Hicks argued that the proof failed on two particular elements of his alleged crime: the victim's age and whether sexual contact occurred. The circuit court rejected these arguments. He thus preserved these points for appeal. Ark. R. Crim. P. 33.1(c); *Gardner v. State*, 76 Ark. App. 258, 262, 64 S.W.3d 761, 763 (2001).

But our court holds that Hicks needed to go deeper. Hicks had to give specifics, the court concludes, about the obvious aspects of the sexual-contact element—improper touching and sexual gratification—to preserve his sufficiency challenge for appeal. Ark. Code Ann. § 5-14-101(9) (Repl. 2006). I respectfully disagree.

The cited precedent does not require this kind of multi-layer preservation. *Eastin* and *Pratt* are general-objection cases, where the defendant made no reference at all to specific elements. *Phillips* and *Tester* are different-objection cases, where the defendant made one specific argument at trial and then made a different specific argument on appeal. Hicks's case presents neither situation.

I would hold that Hicks's motion sufficed. We should not further tighten our already-strict preservation doctrine. The reason behind Rule 33.1 does not require that directed-verdict motions include detailed argument about embedded aspects of the specific element challenged. *Wilson v. State*, 332 Ark. 7, 10–11, 962 S.W.2d 805, 807–08 (1998). The target of Hicks's sufficiency challenge was and is discernable. We should therefore decide this case on the merits.